(2)

No. 86-951

IN THE

Supreme Court of the United States

October Term, 1986

NORMAN PERL,

Petitioner,

v.

WILLIAM WERNZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF IN OPPOSITION OF RESPONDENT WILLIAM WERNZ

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QUESTIONS PRESENTED

1. Whether the Minnesota Supreme Court's Use of the Rules of Civil Appellate Procedure To Reconsider a Final Disciplinary Order, in the Absence of a Specific Provision Allowing Such Reconsideration in the Rules Governing Attorney Disciplinary Proceedings, Violated Petitioner's Right To Due Process?

2. Whether Attorney Disciplinary Proceedings Are Essentially Criminal in Nature for Purposes of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

Petitioner: Norman Perl is an attorney at law in the State of Minnesota.

Respondent: William Wernz is the Director of the Office of the Minnesota Lawyers Professional Responsibility Board.

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In the Matter of the Application for the Discipline of Norman Perl, an Attorney at Law of the State of Minnesota, No. CX-86-343 (Minn. August 1, 1986). (A-1.)[1]

In the Matter of the Application for the Discipline of Norman Perl, an Attorney at Law of the State of Minnesota, 394 N.W.2d 487 (Minn. 1986). (A-23.)

In the Matter of the Application for the Discipline of Norman Perl, an Attorney at Law of the State of Minnesota, No. CX-86-343 (Minn., November 6, 1986). (A-26.)

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[1] Throughout this brief, the abbreviation "A-" is a reference to the Appendix to the Petition for Writ of Certiorari to the Supreme Court of Minnesota.

CONSTITUTIONAL PROVISIONS AND STATE REGULATIONS

United States Constitution, Amendment V. (Pet. 3.)

Pertinent portions of the Minnesota Rules of Civil Appellate Procedure are set forth in the Appendix to this Brief. (State A-1.)[2]

Pertinent portions of the Minnesota Rules of Lawyers Professional Responsibility Board are set forth at State A-2 to A-3.

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[2] Throughout this brief the abbreviation "State A-" refers to the Appendix to the Brief in Opposition of Respondent William Wernz.

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NORMAN PERL,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF IN OPPOSITION OF RESPONDENT WILLIAM WERNZ

Respondent William Wernz respectfully requests the Court deny the Petition for Writ of Certiorari herein on the grounds that the questions presented were not decided below in a way which conflicts with the decisions of other state courts of last resort or a federal court of appeals or with applicable decisions of this Court. Nor did the court below decide an important question of federal law which has not been, but should be, settled by this Court.

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari to review a decision of the Minnesota Supreme Court denying Petitioner's motion for reconsideration and petition for rehearing in an attorney disciplinary proceeding. (A-26.) Petitioner Perl is an attorney at law, licensed to practice in the State of Minnesota. Perl is currently the subject of charges of unethical conduct issued by Respondent Wernz, the Director of the Office of the Minnesota Lawyers Professional Responsibility Board.

On January 31, 1986, Wernz filed a petition with the Minnesota Supreme Court for disciplinary action against Perl. On February 27, 1986, Perl filed an answer denying the allegations and alleging affirmative defenses. Perl's answer contained a conditional admission, pursuant to Rules 10(b) and 13(b), Rules of Lawyers Professional Responsibility (hereinafter RLPR). (State A-3.) The conditional admission admitted the allegations, with qualifications, on condition that the court impose the discipline of public reprimand and probation. The court appointed a referee to conduct an evidentiary hearing, which was scheduled to begin July 15, 1986.

By letter to the court dated July 9, 1986, Perl submitted a new conditional admission. He withdrew his answer in its entirety, which operated as an admission of the allegations as set forth in Wernz's petition, on condition that the court impose no more than a one-year suspension and certain other sanctions. The court deemed Perl's letter a motion and held oral argument on July 16, 1986. The court granted Perl's motion on August 1, 1986, suspending him from the practice of law for a period of one year commencing August 4, 1986. (A-1.)

On August 5, 1986, Wernz filed a petition for rehearing pursuant to Rule 140 of the Minnesota Rules of Civil Appellate

Procedure (hereinafter Minn. R. Civ. App. 140). (State A-1.) Perl filed an answering brief. On October 6, 1986, the court granted Wernz's petition for rehearing by vacating its suspension order, withdrawing its opinion of August 1, 1986, and remanding the matter to a referee for a hearing. (A-23.)

On October 10, 1986, Perl filed a Motion for Reconsideration and Petition for Rehearing. Wernz and Perl each filed a memorandum and supporting documents with the court. The court denied Perl's motion and petition on November 6, 1986. (A-26.)

Perl contends that the Rules of Lawyers Professional Responsibility, which govern disciplinary proceedings, do not provide for the court's reconsidering its August 1, 1986, order of suspension, and that the Rules of Civil Appellate Procedure are not applicable to disciplinary proceedings. He maintains that because the court reconsidered its order of suspension under the Rules of Civil Appellate Procedure, the court did not follow its disciplinary procedural rules and thereby violated his right to due process. (Pet. 13.) The Minnesota Supreme Court correctly held that it has authority to reconsider its rulings in disciplinary matters, both under its inherent powers and under Minn. R. Civ. App. P. 140, and has an established practice of doing so. (A-27.)

Perl also contended below that Wernz's August 5, 1986, petition for rehearing could at most result in a rehearing before the court and that there had been no hearing. Perl thus appeared to contend that because the court vacated its August 1, 1986, order of suspension without hearing oral argument on Wernz's petition for rehearing, the court violated Perl's right to due process. The court noted that both parties had ample opportunity to brief the issues and that oral argument was afforded on Perl's motion for consideration of his con-

ditional admission. The court correctly concluded that the requirements of due process had been more than adequately satisfied. (A-27.)

Perl further contended that the court's acceptance of his offer of a one-year suspension in exchange for his conditional admission of the charges was analogous to a plea bargain which was then binding on the court. The court characterized the analogy as completely misleading. The court noted that this case came before it on Perl's motion for relief. The court was under the impression that, while Perl and Wernz had not stipulated to a disposition of the case, Wernz thought Perl's overall proposal was not wholly unreasonable and they had essentially agreed on the conditions of any suspension, including Perl's reimbursement of the Board's expenses which involved over a quarter of a million dollars. It became clear to the court on reconsideration that such was not the case. (A-28.)

Finally, Perl contended that the court's October 6, 1986, order vacating his suspension and remanding for a hearing violated due process because he had already begun to withdraw from the practice of law. The court noted that Perl was aware Wernz had filed a petition for rehearing and that Perl had neither asserted a right to a stay of the August 1, 1986, order of suspension under Rule 140.03 nor applied for one. Perl chose to withdraw from the practice of law on the assumption that the petition would be denied. He simply chose wrong. (A-28.)

SUMMARY OF THE ARGUMENT

While the procedural rules governing attorney disciplinary proceedings do not address the reconsideration of final orders issued by the Minnesota Supreme Court, the court has jurisdiction to reconsider such orders. The court has jurisdiction under the Rules of Civil Appellate Procedure, which allow the court to review orders of administrative agencies and to grant other relief in civil proceedings which the court is competent to give. The court's competency here arises from its inherent power to govern the bar. Moreover, the court has an established practice of reconsidering final disciplinary orders.

The double jeopardy clause of the fifth amendment to the United States Constitution is not applicable to attorney disciplinary proceedings. Such proceedings are not essentially criminal in nature because they do not have the same objectives and consequences as criminal prosecutions.

ARGUMENT

I. THE MINNESOTA SUPREME COURT HAS AUTHORITY TO RECONSIDER FINAL ATTORNEY DISCIPLINE ORDERS UNDER BOTH ITS INHERENT POWERS AND THE RULES OF CIVIL APPELLATE PROCEDURE.

Perl argued that the Minnesota Supreme Court violated his due process rights because it acted outside the rules governing disciplinary matters when it reconsidered its August 1, 1986, order suspending him for one year. (Pet. 13.) The court correctly found no merit to Perl's argument. As the following will demonstrate, the Minnesota Supreme Court had jurisdiction to reconsider its rulings in disciplinary matters, both under its inherent powers and under Rule 140 of the Minne-

sota Rules of Civil Appellate Procedure, and has an established practice of doing so. (A-27.)

Attorney disciplinary proceedings in Minnesota are governed by the Rules of Lawyers Professional Responsibility:

> It is of primary importance to the public and to the members of the Bar that cases of lawyers' alleged disability or unprofessional conduct be promptly investigated and disposed of and that disability or disciplinary proceedings be commenced in those cases where investigation discloses they are warranted. Such investigations and proceedings shall be conducted in accordance with these Rules.

Rule 2, RLPR. (State A-2.) The rules provide that the court makes the final disciplinary disposition:

> Upon conclusion of the proceedings, this Court may:
>
> (1) Disbar the lawyer;
>
> (2) Suspend him indefinitely or for a stated period of time;
>
> (3) Order the lawyer to pay a fine, costs, or both;
>
> (4) Place him on a probationary status for a stated period, or until further order of this Court, with such conditions as this Court may specify and to be supervised by the Director;
>
> (5) Reprimand him;
>
> (6) Order the lawyer to successfully complete within a specified period such written examination as may be required of applicants for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility;
>
> (7) Make such other disposition as this Court deems appropriate; or
>
> (8) Dismiss the petition for disciplinary action.

Rule 15(a), RLPR. (State A-3.) There is no explicit provision in the disciplinary rules for the court to reconsider a disposition rendered under Rule 15(a). In the present case, however, the court correctly asserted jurisdiction to reconsider its August 1, 1986, order suspending Perl both under Minn. R. Civ. App. P. 140 (State A-1) and under its inherent powers.

The scope of the Rules of Civil Appellate Procedure, set forth in Rule 101 as follows, clearly makes Minn. R. Civ. App. P. 140 applicable to the Court's reconsideration of disciplinary orders:

> These rules govern procedure in the Supreme Court and the Court of Appeals of Minnesota in civil appeals; in criminal appeals insofar as the rules are not inconsistent with the Rules of Criminal Procedure; in proceedings for review of orders of administrative agencies, boards or commissions; and on applications for writs or other relief in civil proceedings which the Supreme Court, the Court of Appeals or a justice or judge thereof is competent to give.

(State A-1.) Rule 101 contains two bases for the court's jurisdiction to reconsider its disciplinary rulings under Minn. R. Civ. App. P. 140. First, Rule 101 makes Rule 140 applicable in proceedings for review of orders of administrative agencies, boards or commissions. Perl contends that the court acts as an agency when it hears disciplinary matters and is limited by the rules of the Professional Responsibility Board. The court can only act under the Rules of Civil Appellate Procedure when it is hearing matters as the supreme judicial body of the state. (Pet. 12-13.) Without belaboring such distinctions beyond their analytical usefulness, it is clear that if Rule 101 makes the Rules of Civil Appellate Procedure applicable to the review of orders of administrative agencies,

then Rule 101 gives the court jurisdiction to review the orders it issues as the administrative agency that supervises and disciplines the Minnesota Bar.

Perl cites *Robinson v. Ariyushi*, 753 F.2d 1468 (9th Cir. 1985), as support for the proposition that the court's use of the Rules of Civil Appellate Procedure to reconsider its August 1, 1986, order of suspension was an impermissible "novel borrowing by the State Supreme Court" from the rules of appellate procedure. (Pet. 12.) Perl's reliance on *Robinson* is misplaced. The judgment in *Robinson* was vacated by this Court and remanded to the Ninth Circuit for further consideration in light of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. ——, 105 S.Ct. 3108 (1985). —— U.S. ——, 106 S.Ct. 3269 (1986).

Perl also cites *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 138 (1951), as support for his meritless contention that the court's use of Rule 140 was an impermissible creation of a disciplinary procedural rule by interpretation. (Pet. 13.) In *Joint Anti-Fascist Refugee Committee v. McGrath*, the court considered an arbitrary decision by the United States Attorney General to designate three organizations as communist and to place the names of the organizations on a list of subversive organizations furnished to the Loyalty Review Board of the Federal Civil Service Commission. 341 U.S. 123, 124-125 (1951). The designation of the organizations at issue was made without notice or opportunity to be heard. *Id.* at 138, note 11. The *McGrath* court did not reach the constitutional questions raised by the petitioners there but rather confined its opinion to whether the Attorney General's action was arbitrary and therefore outside his authority. *Id.* at 135-136. *McGrath* thus provides no authority for Perl's contention that his right to due process was violated by the Minnesota

court's application of the civil appellate rules to the reconsideration of a final disciplinary rule.

The present case involves no significant action by the Minnesota Supreme Court impermissibly creating a disciplinary procedural rule by interpretation. As the court noted in the memorandum accompanying its November 6, 1986, order, the court has an established practice of reconsidering final disciplinary orders. *See In Re Tracy*, 197 Minn. 35, 267 N.W. 142 (1936); *In Re McDonald*, 204 Minn. 61, 284 N.W. 888 (1939); *In Re Complaint of J.G. against R.P.*, No. CX-85-1773 (Minn. September 15, 1986). (State A-13 to A-17.)[3] Indeed, Perl's own actions belie his claim that the court may not consider petitions for rehearing in disciplinary proceedings. Perl has filed such a petition during the course of his extensive procedural challenges to the investigation and prosecution of the charges of unprofessional conduct. *In Re Charges of Unprofessional Conduct Against N.P.*, 361 N.W.2d 386 (Minn. 1985), reh. den., Nos. C4-84-981, CO-84-1223 (July 17, 1985), app. dismissed 106 S.Ct. 375 (1985). (*See* State A-18 for July 17, 1985, order denying rehearing.)

The second basis for the Minnesota court's jurisdiction to reconsider its disciplinary rules under the civil appellate rules is contained in Minn. R. Civ. App. P. 101's provision that the rules are applicable to "applications for . . . other relief in civil proceedings which the Supreme Court . . . is competent to give." (State A-1.) The court's competency to reconsider

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[3] The Rules of Lawyers Professional Responsibility allow an attorney who has been admonished by the Director to have the admonition reviewed by a panel of the Board. Rule 8(c)(2)(iii) RLPR. While there is no rule providing for the court either to review or reconsider a panel's affirmance of the Director's admonition, the court has also established a practice of entertaining petitions for review and rehearing in these circumstances.

its disciplinary decisions absent an express provision for rehearing or reconsideration in the Rules of Lawyers Professional Responsibility arises from its inherent powers.

The Minnesota Supreme Court has held that it is within its inherent powers to determine the scope of its jurisdiction, particularly when a case is of pressing concern to the public or to the litigants. *Minn. Viking Football Club v. Metro Council,* 289 N.W.2d 426, 430 (Minn. 1979). The court set forth the nature and scope of its inherent powers 45 years ago:

> The fundamental functions of the court are the administration of justice and the protection of the rights guaranteed by the constitution. To effectively perform such functions, as well as its other ordinary duties, it is essential that the court have the assistance and cooperation of an able, vigorous, and honorable bar. It follows that the court has not only the power, but the responsibility as well, to make any reasonable orders, rules, or regulations which will aid in bringing this about, and that the making of regulations and rules governing the legal profession falls squarely within the judicial power thus exclusively reserved to the court. In its past decisions this power has been recognized repeatedly as within the province of the court. Thus, in *Re Greathouse,* 189 Minn. 51, 55, 248 N.W. 735, 737 [1933], the principle is expressed as follows: 'The judicial power of this court has its origin in the Constitution, but when the court came into existence, it came with inherent powers. Such power is the right to protect itself, to enable it to administer justice whether any previous form of remedy has been granted or not. This same power authorizes the making of rules of practice.'

Petition for Integration of Bar of Minnesota, 216 Minn. 195, 199, 12 N.W.2d 515, 518 (1943). Further, the court noted that it had exercised its inherent powers in the past to disbar attorneys from practice. *Id.*

The court's inherent power "to make any reasonable orders" to further the functions of the court, including obtaining the assistance and cooperation of an honorable bar, encompasses the power to reconsider its orders in disciplinary matters. To argue otherwise is to propose that once the court issues an order of suspension or disbarment, it may never reconsider its decision no matter what new facts, law, or mitigating circumstances may come to light. Such a handicap upon the court's inherent powers would be entirely repugnant to its fundamental functions to administer justice, protect the rights guaranteed by the constitution, and govern the bar.

Moreover, Perl is being less than candid with this Court when he asserts as follows:

> The Order vacating the Order of suspension was entered on October 6, 1986; and this was a complete surprise to Petitioner, who up until that time by reading the Minnesota Rules of Civil Appellate Procedure and the Minnesota Rules on Lawyers Professional Responsibility could detect no authorization for the Court to vacate the order of suspension or to remand it for further hearing. Petitioner thus was deprived in earlier proceedings of an opportunity, before October 6, 1986 to assert an argument against what would be totally unpredictable, the novel borrowing by the State Supreme Court of the rules for reconsideration and rehearing under the Minnesota Rules of Appellate Procedure.

(Pet. 11-12.) Perl had clear notice that the court was asked to reconsider its suspension order under the civil appellate rules.

Wernz' Petition for Rehearing of the court's August 1, 1986, order of suspension specifically cites Minn. R. Civ. App. P. 140:

> Pursuant to Rule 140, Rules of Civil Appellate Procedure, the Director of the Office of Lawyers Professional Responsibility (Director) petitions the Supreme Court for rehearing of its August 1, 1986, order in the above-captioned matter.

(State A-5.) Perl's Response to Petition for Rehearing then argued at length against the court's reconsidering its order under Rule 140. (State A-11 to A-12.) Thus Perl was neither surprised nor deprived of an opportunity to present argument on the court's reconsideration of its August 1, 1986, order of suspension under Minn. R. Civ. App. P. 140.

Finally, Perl contends without warrant that he was denied an opportunity to be heard on the merits of Wernz' petition for a rehearing of the August 1, 1986, order of suspension. The court provided an opportunity for oral argument on Perl's original motion for relief which resulted in the original order of suspension. Further, both Wernz and Perl briefed the merits of their subsequent petitions for rehearing and reconsideration. Perl offers no authority for his meritless proposition that due process required further oral argument.

Conspicuously absent from the petition herein is any authority that demonstrates that the Minnesota court's jurisdictional determination in the circumstances of this case is in conflict with the decisions of another state court of last resort, a federal court of appeals, or with applicable decisions of this Court. Nor is there any demonstration that the court's use of its appellate rules to reconsider a disciplinary order raises an important question of federal law which has not been, but should be, settled by this Court.

In conclusion, the Minnesota court has jurisdiction to reconsider final disciplinary orders both under the Minnesota Rules of Civil Appellate Procedure and under its inherent powers, and has an established practice of doing so. The Petition for Writ of Certiorari should therefore be denied.

II. THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT DOES NOT APPLY TO ATTORNEY DISCIPLINARY PROCEEDINGS BECAUSE THEY ARE NOT ESSENTIALLY CRIMINAL IN NATURE.

Perl argues that the double jeopardy clause of the fifth amendment applies to attorney disciplinary proceedings. Perl further argues that his admission of the disciplinary charges on condition that the Minnesota Court impose no more than a one-year suspension was analogous to a plea bargain which the court accepted by its August 1, 1986, order of suspension. He then concludes that the court's October 6, 1986, order vacating the suspension order and remanding the disciplinary matter for hearing placed him in double jeopardy. (Pet. 18-21.) The Minnesota Supreme Court correctly characterized the analogy as completely misleading. (A-27.) As the following will demonstrate, the double jeopardy clause of the fifth amendment only applies to proceedings which are essentially criminal. Further, the decision of the Minnesota court comports with the decisions of other state courts of last resort which have declined to apply the principle of double jeopardy to a variety of administrative proceedings, including attorney disciplinary matters.

The double jeopardy clause provides as follows: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. In the constitutional sense, jeopardy denotes the risk that is tradi-

tionally associated with a criminal prosecution. "The risk to which the clause refers is not present in proceedings that are not essentially criminal." *Breed v. Jones*, 421 U.S. 519, 528 (1975). The Court in *Breed* reasoned that the double jeopardy clause was applicable to juvenile court proceedings because they are essentially criminal in nature. The objective of a juvenile court proceeding is to determine whether the juvenile defendant has committed acts that violate criminal laws. The consequences of the proceedings include both the stigma inherent in such a determination and the deprivation of liberty. *Id.* at 529.

Attorney disciplinary proceedings are not essentially criminal in nature. First, their objective is not to determine whether an attorney has committed acts that violate criminal laws. The substance of the codes of professional conduct of the state bars regulates conduct relative to the attorney's position of trust in relation to clients and courts. Violations of the codes, even when as egregious as in the case below, do not amount to criminal conduct. *See* Petition for Disciplinary Action. (A-11 to A-23.) Second, the consequences of attorney disciplinary proceedings do not include the same risks as essentially criminal proceedings. While it is true that stigma attaches to an attorney who has been publicly disciplined, such stigma is not of the same damaging nature as the stigma of a criminal conviction. Likewise, attorneys facing disciplinary proceedings risk suspension or disbarment. However, such consequences do not approach the extraordinary risk of loss of liberty faced by defendants in an essentially criminal proceeding. Since the objectives and consequences of attorney disciplinary proceedings carry markedly less risk than criminal prosecutions, they cannot be characterized as essentially criminal.

Perl argues that the double jeopardy clause should now be applied to attorney disciplinary proceedings because the Court once characterized such proceedings as quasi-criminal in nature. *In re Ruffalo*, 390 U.S. 544, 551 (1968). (Pet. 18.) In *Ruffalo*, the Court's characterization of the disciplinary proceeding as quasi-criminal was dicta in the context of the procedural due process issue raised there. Such a characterization is no basis for the Court to take the extreme position urged by Perl that the full panoply of constitutional protections available to criminal defendants should now apply to attorneys in disciplinary proceedings.

Moreover, state courts of last resort have consistently held that the double jeopardy clause does not apply to a variety of administrative proceedings. The New Hampshire Supreme Court has held that the double jeopardy clause does not apply to proceedings for involuntary commitment and guardianship. *State v. Hudson*, 425 A.2d 255, 257-258 (N.H. 1981); *In re DeLucca*, 426 A.2d 32, 34 (N.H. 1981). The Supreme Judicial Court of Massachusetts held that the double jeopardy clause is not applicable to proceedings to secure pregnancy expenses and child support payments. *Sullivan v. Commonwealth*, 383 Mass. 410, 412, 419 N.E.2d 846, 848 (1981). The Supreme Court of Washington has refused to apply the double jeopardy clause to civil proceedings brought to assess fraudulent overpayments of public assistance funds. *Beckett v. Dept. of Social and Health Services*, 87 Wash.2d 184, 188, 550 P.2d 529, 532 (1976).[4]

Most significantly, the Supreme Court of California has held that attorneys subject to disciplinary proceedings are not afforded all of those procedural safeguards which are ex-

[4] Reversed as to standard of proof in such proceedings. *In re McLaughlin*, 676 P.2d 444, 451 (Wash. 1984).

tended to criminal defendants and has specifically rejected the application of double jeopardy to those proceedings. *Fitzsimmons v. State Bar of California,* 193 Cal. Rptr. 896, 34 Cal.3d 327, 332-333, 667 P.2d 700, 703-704 (1983). The *Fitzsimmons* court held that disciplinary proceedings are *sui generis,* neither civil nor criminal in character, and the ordinary criminal procedural safeguards do not apply. *Id.*

Finally, no decision of a state court of last resort, a federal court of appeals, or this Court conflicts with the Minnesota Supreme Court's declining to view Perl's offer of an admission on condition of a one-year suspension as a plea bargain. The court properly viewed the offer as a motion for relief which it denied on reconsideration. (A-27 to A-28.)

In conclusion, the double jeopardy clause of the fifth amendment is not applicable to attorney disciplinary proceedings because they are not essentially criminal in nature. The Petition for Writ of Certiorari should therefore be denied.

CONCLUSION

For the foregoing reasons, Respondent Wernz respectfully submits that the petition for Writ of Certiorari presents no questions which were decided below in conflict with the decisions of other state courts of last resort, a federal court of appeals or this Court. Nor did the decision below decide an important question of federal law which has not been, but should be, settled by this Court. The petition should therefore be denied.

Dated: December 31, 1986.

Respectfully submitted,
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APPENDIX

MINNESOTA RULES OF CIVIL APPELLATE PROCEDURE

Rule 101. Scope of Rules; Definitions

101.01 Scope

These rules govern procedure in the Supreme Court and the Court of Appeals of Minnesota in civil appeals; in criminal appeals insofar as the rules are not inconsistent with the Rules of Criminal Procedure; in proceedings for review of orders of administrative agencies, boards or commissions; and on applications for writs or other relief in civil proceedings which the Supreme Court, the Court of Appeals or a justice or judge thereof is competent to give.

101.02 Definitions

Subdivision 1. When used in these rules, the words listed below have the meanings given them.

Subd. 2. "Appellate court" means the Supreme Court pursuant to Minnesota Statutes, Chapter 480, or the Court of Appeals pursuant to Minnesota Statutes, Chapter 480A.

Subd. 3. "Judge" means a justice of the Supreme Court or a judge of the Court of Appeals.

Subd. 4. "Trial court" means the court or agency whose decision is sought to be reviewed.

Subd. 5. "Clerk of the appellate courts" means the clerk of the Supreme Court and the Court of Appeals.

Rule 102. Suspension of Rules

In the interest of expediting decision upon any matter before it, or for other good cause shown, the Supreme Court or the Court of Appeals, except as otherwise provided in Rule 126.02, may suspend the requirements or provisions of these rules on application of a party or on its own motion and may order proceedings in accordance with its direction.

Rule 140. Petition for Rehearing in Supreme Court

140.01 Petition for Rehearing

No petition for rehearing shall be allowed in the Court of Appeals.

A petition for rehearing in the Supreme Court may be filed within 10 days after the filing of the decision or order unless the time is enlarged by order of the Supreme Court within the 10-day period. The petition shall set forth with particularity:

(a) any controlling statute, decision or principle of law; or

(b) any material fact; or

(c) any material question in the case which, in the opinion of the petitioner, the Supreme Court has overlooked, failed to consider, misapplied or misconceived.

140.02 Service; Filing

The petition shall be served upon the opposing party who may answer within 5 days after service. Oral argument in support of the petition will not be permitted. Fourteen copies of the petition, produced and sized as required by Rule 132.01, shall be filed with the clerk. A filing fee of $50 shall accompany the petition for rehearing.

140.03 Stay of Judgment

The filing of a petition for rehearing shall stay the entry of judgment until disposition of the petition. It does not stay the taxation of costs. If the petition is denied, the party responding to the petition may be awarded attorney fees to be allowed by the court in the amount not to exceed $500.

RULES OF LAWYERS PROFESSIONAL RESPONSIBILITY

Rule 2. Purpose

It is of primary importance to the public and to the members of the Bar that cases of lawyers' alleged disability or unprofessional conduct be promptly investigated and disposed

of and that disability or disciplinary proceedings be commenced in those cases where investigation discloses they are warranted. Such investigations and proceedings shall be conducted in accordance with these Rules.

(Amended July 22, 1982.)

Rule 8. Director's Investigation

* * * *

(c) Disposition.

(1) Determination Discipline not Warranted. If, in a matter where there has been a complaint, the Director concludes that discipline is not warranted he shall so notify the lawyer involved, the complainant, and the Chairman of the District Committee, if any, that has considered the complaint. The notification:

(i) May set forth an explanation of the Director's conclusion;

(ii) Shall set forth the complainant's identity and the complaint's substance; and

(iii) Shall inform the complainant of his right to appeal under subdivision (d).

(2) Admonition. In any matter, with or without a complaint, if the Director concludes that a lawyer's conduct was unprofessional but of an isolated and non-serious nature, he may issue an admonition. The Director shall notify the lawyer in writing:

(i) Of the admonition;

(ii) That the admonition is in lieu of the Director's presenting charges of unprofessional conduct to a Panel;

(iii) That the lawyer may, by notifying the Director in writing within fourteen days, demand that the Director so present the charges to a Panel which shall consider the matter de novo or instruct the Director to file a Petition for Disciplinary Action in this Court; and

(iv) That unless the lawyer so demands the Director after that time will notify the complainant, if any, and the Chairman of the District Committee, if any, that has considered the complaint, that the Director has issued the admonition.

If the lawyer makes no demand under clause (iii), the Director shall notify as provided in clause (iv). The notification to the complainant, if any, shall inform him of his right to appeal under subdivision (d).

Rule 10. Dispensing with Panel Proceedings

(a) Agreement of Parties. The parties by written agreement may dispense with some or all procedures under Rule 9 before the Director files a petition under Rule 12.

(b) Admission or Tender of Conditional Admission. If the lawyer admits some or all charges, or tenders an admission of some or all charges conditioned upon a stated disposition, the Director may dispense with some or all procedures under Rule 9 and file a petition for disciplinary action together with the lawyer's admission or tender of conditional admission. This Court may act thereon with or without any of the procedures under Rules 12, 13, or 14. If this Court rejects a tender of conditional admission, the matter may be remanded for proceedings under Rule 9.

(c) Criminal Convictions. If a lawyer is convicted of a felony under Minnesota statute, a crime punishable by incarceration for more than one year under the laws of any other jurisdiction, or any lesser crime a necessary element of which involves interference with the administration of justice, false swearing, misrepresentation, fraud, wilfull extortion, misappropriation, theft, or an attempt, conspiracy, or solicitation of another to commit such a crime, the Director may either submit the matter to a Panel or, with the approval of the chairman of the Board, file a petition under Rule 12.

(d) Additional Charges. If a petition under Rule 12 is pending before this Court, the Director need not present the matter to a Panel before amending the petition to include additional charges based upon conduct committed before or after the petition was filed.

(e) Discontinuing Panel Proceedings. The Director may discontinue Panel proceedings for the matter to be disposed of under Rule 8(c)(1), (2), or (3).

Rule 13. Answer to Petition for Disciplinary Action

(a) Filing. Within 20 days after service of the petition, the respondent shall file an original and nine copies of an answer in this Court. The answer may deny or admit any accusations or state any defense, privilege, or matter in mitigation.

(b) Conditional Admission. The answer may tender an admission of some or all accusations conditioned upon a stated disposition.

(c) Failure to File. If the respondent fails to file an answer within the time provided or any extension of time this Court may grant, the petition's allegations shall be deemed admitted and this Court may proceed under Rule 15.

Rule 15. Disposition; Protection of Clients

(a) Disposition. Upon conclusion of the proceedings, this Court may:

(1) Disbar the lawyer;

(2) Suspend him indefinitely or for a stated period of time;

(3) Order the lawyer to pay a fine, costs, or both;

(4) Place him on a probationary status for a stated period, or until further order of this Court, with such conditions as this Court may specify and to be supervised by the Director;

(5) Reprimand him;

(6) Order the lawyer to successfully complete within a specified period such written examination as may be required of applicants for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility;

(7) Make such other disposition as this Court deems appropriate; or

(8) Dismiss the petition for disciplinary action.

(b) Protection of Clients. When a lawyer is disciplined or permitted to resign, this Court may issue orders as may be appropriate for the protection of clients or other persons.

FILE NO. CX-86-343
STATE OF MINNESOTA
IN SUPREME COURT

In the Matter of the Application for the Discipline
of NORMAN PERL, an Attorney at Law
of the State of Minnesota

PETITION FOR REHEARING

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Pursuant to Rule 140, Rules of Civil Appellate Procedure, the Director of the Office of Lawyers Professional Responsibility (Director) petitions the Supreme Court for rehearing of its August 1, 1986, order in the above-captioned matter. In this extremely important proceeding, the Court has never received the benefit of the parties' briefs on the question of appropriate discipline.

The principal material fact and material question which, in the opinion of the Director, the Supreme Court has overlooked, failed to consider or misapplied is the appropriate discipline for respondent Norman Perl's dishonesty and obstruction of the disciplinary process. The Court has also misconceived several purported mitigating circumstances.

The factual paragraphs, deemed admitted, which the Director believes the Court overlooked, are stated in the Petition for Disciplinary Action at Count III, paragraph F, and Count VI, paragraphs A-G.

The majority Opinion, at 5, summarily refers to these factual allegations. Section II of the Opinion, discussing the law and the appropriate sanction, makes no mention at all of these very important facts. Section II aptly notes, ". . . the corrosive effect of rampant commercialism on professional standards," but fails to take into account respondent's dishonesty.

Dishonesty is not a factor which can safely be omitted from the Court's consideration and explanation to the public and the bar of appropriate discipline in an important case. The American Bar Association recently adopted the following standard:

> 6.1 FALSE STATEMENTS, FRAUD, AND MISREPRESENTATION
>
> Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:
>
> 6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a

> false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

The particular forms of respondent's dishonesty should be explicitly considered by the Court and taken into account in judging the appropriate discipline.

1. Respondent altered numerous documents and made others unavailable. Respondent caused the law firm books to be altered to cover up the solicitation fees paid to Margaret Hartman and to make the payments made to Willard Browne falsely appear as payment for other purported services.[1] Respondent also sought to conceal law firm documents furnished to Hartman.

2. Respondent involved others in obstruction of the disciplinary investigation. Count 6, paragraphs E and F, now admitted, reveal that respondent instructed Orville Heil, attorney Stephen Eckman and other employees to obtain false statements from third parties or make documents unavailable. In disbarring another attorney, this Court noted,

> In addition, there are other serious aggravating violations, including the attempt to have another person, a beneficiary of the estate respondent was probating, make a false statement to the Board.

Matter of Austin, 333 N.W.2d 633, 635 (Minn. 1983). Austin only attempted to obstruct the investigation, (the beneficiary

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[1] Although the Opinion (at 3-4) indicates the Court is "quite conversant with the facts and circumstances" from other litigation related to Mr. Perl, the Court has not previously taken into account the alteration of documents related to Browne. *See Rice v. Perl*, 320 N.W.2d 407, 409, n.2 (Minn. 1982). Indeed, the substance of Counts I, II, IV, V and VI is not present in the *Perl* cases previously considered by the Court.

refused to write the letter), and he made only a single attempt. *Id.* at 634. Respondent succeeded in obstructing the investigation and did so through systematic alteration of documents and involvement of third parties.

3. Respondent made false statements to the district ethics committee (Count VI., paragraph C.). While the Opinion repeatedly notes respondent's alleged "contriteness," it displays no consideration of his false statements to the Court's representatives.

A material fact apparently overlooked by the Court, is the effect of its leniency toward Mr. Perl on the Court's desire to "be both fair and consistent" in discipline cases. *Matter of Serstock*, 316 N.W.2d 559, 561 (Minn. 1982). The Court has plenary authority and responsibility over lawyers' professional responsibility. If attorneys are able to lie, fabricate documents and induce others to help them conceal the truth of their misconduct, and the Court does not even mention the appropriate discipline for such actions in its Opinion, the discipline system will be crippled. There are presently pending before the Court several cases involving allegations of attorney deceit, false statements during disciplinary investigation and fabrication of documents. If the allegations are proven, how will the Court discipline these attorneys and be both consistent with *Perl* and as firm as the operation of the discipline system demands?

Rule 25, Rules on Lawyers Professional Responsibility, was promulgated because the Court had ". . . long recognized that it is incumbent upon an attorney to cooperate with disciplinary authorities in their investigation and resolution of complaints against him." *Matter of Cartwright*, 282 N.W. 2d 548, 551 (Minn. 1979) (citations omitted). Cartwright was suspended for six months for failure to cooperate, although the under-

lying complaints against him were found to be without merit. The underlying complaints against Norman Perl have been found by the Court to be of considerable merit, and yet his obstruction of the disciplinary investigation has not resulted in substantially more serious discipline than Cartwright's. Systematic dishonesty and concealment of the truth during disciplinary investigations is surely a far more serious matter than non-cooperation, and the sanction imposed should reflect this difference.

The Opinion states that "ordinarily we would agree with the Director that a longer suspension should be imposed," but extraordinary circumstances are believed to justify a one year suspension. Among these appear respondent's alleged "contriteness," his acquittal and his age. In disbarring a much older attorney, the Court stated, ". . . nor do we find the respondent's age to be a mitigating factor." *In re Hetland*, 275 N.W.2d 582, 585 (Minn. 1978). The Court has also previously stated that whether an attorney has been convicted "is unimportant to a disciplinary proceeding." *Matter of Hanratty*, 277 N.W.2d 373, 376 (Minn. 1979).

Although the majority opinion relies on respondent's alleged contrition, there is no evidence of contrition. This is so, first, because there is no evidence at all—only conditional admissions by respondent. Secondly, respondent's actions belie any claims of contrition. Respondent no doubt regrets the entanglements in litigation, publicity and other adverse effects of his actions. Such regret is not, however, the same as the contrition which the Court takes so seriously into account. Contrition must be preceded by recognition of misconduct, yet respondent has never unconditionally admitted his misconduct, and indeed has repeatedly and actively sought to conceal it from the very Court which now finds him con-

trite. Further, respondent has to an unprecedented degree contested disciplinary proceedings and challenged every foundation of the professional responsibility system. Surely this litigiousness does not vouch for respondent's purported contrition. Finally, respondent has had to be ordered to disgorge ill-gotten gains; contrition would have been evidenced by voluntary restitution.

The Director respectfully requests the Court to order a rehearing for the purpose of considering respondent's dishonesty and obstruction of the investigation of his misconduct; and considering whether alleged mitigating circumstances genuinely mitigate.

Dated: August 5, 1986.

Respectfully submitted,

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STATE OF MINNESOTA
IN SUPREME COURT

CX-86-343

In the Matter of the Application for the Discipline of NORMAN PERL, an Attorney at Law of the State of Minnesota.

RESPONSE TO PETITION FOR REHEARING

The unanticipated and baseless Petition for Rehearing, which appears to have been designed only to vilify Respondent publicly one more time, (a purpose it has in any event conspicuously achieved), should be denied summarily, for the following reasons:

1. The Director agreed *before* the Court's decision that the result reached by the Court was "not wholly unreasonable," and that the Director would "proceed to hearing, or in whatever other fashion the Court may find appropriate." (See attached letter of Director Wernz, July 10, 1986.)

2. There is no provision in the Minnesota Rules on Lawyers Professional Responsibility or elsewhere for a Petition for Rehearing after a decision by this Court in a disciplinary proceeding against a lawyer.

3. Assuming this Court has the inherent power to entertain the petition, or that the Minnesota Rules of Civil Appellate Procedure apply to such proceedings (though these are not civil, but quasi-criminal or sui generis), the petition must nevertheless be denied for its utter lack of merit and its manifest failure to satisfy the strict criteria for such a petition, amounting virtually to an affront to this Court and its decision.

4. Petitions for Rehearing are greatly disfavored and should be sought only where the Court has quite obviously

made so serious an error as to be a manifest injustice, resulting from a) a controlling statute, decision or principle of law, b) a material fact, or c) a material question which the Court clearly "overlooked, failed to consider, misapplied or misconstrued." Rule 140, *Minn.R.Civ.App.Proc.* The petition sets forth no credible allegations of any such grievous failure.

Moreover, the Director's agreement on three occasions (to Respondent's counsel, in his letter to the Court, and at oral argument), that the disposition is "not wholly unreasonable" *in itself* precludes rehearing, since with that admission it cannot follow that the court's imposition of that disposition *is* wholly unreasonable, which is *a fortiori* a prerequisite for rehearing.

* * * *

Respectfully submitted,
MESHBESHER, SINGER &
SPENCE, LTD.
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August 13, 1986.

STATE OF MINNESOTA
IN SUPREME COURT

CX-85-1773

In the Matter of the Complaint of J.G.,
Complainant, against R.P., Respondent.

PER CURIAM. Took no part, Amdahl, C.J. and Kelley, J.

Filed August 8, 1986, Wayne Tschimperle, Clerk of Appellate Courts.

OPINION

Per Curiam.

Pursuant to Rule 9(1), Rules on Lawyers Professional Responsibility (RLPR), respondent R.P. has filed a notice of appeal challenging a panel of the Lawyers Professional Responsibility Board's (LPRB) affirmance of an admonition issued by the director in connection with an attorney fee dispute between respondent and complainant, J.G., a former client. We affirm as modified.

J.G. sought R.P.'s legal representation in connection with a marital dissolution proceeding, signing a retainer agreement by which she agreed to reimburse respondent for costs and disbursements paid or monies advanced by him on her behalf. On two separate occasions, R.P. was in Washington, D.C. on business unrelated to this client's interests and returned to Minneapolis specifically to attend to her affairs. This dispute arose when, in response to respondent's billing of these travel expenses, J.G. refused payment and filed a complaint with the LPRB. Complainant also objected to an item of correspondence in which respondent warned her that continued utterances regarding R.P.'s legal representation might give rise to an action for libel or slander.

During the pendency of these disciplinary proceedings, complainant also submitted the reasonableness of the fees to the Legal Fee Arbitration Board of the local bar association. Acknowledging the existence but ignoring the implication of the professional proceeding, the arbitrators reduced R.P.'s fees only by that amount representing the claimed travel expenses, finding those expenses inappropriate. The record reflects that R.P. has abided in all respects by the arbitrator's award.

The director, upon recommendation of the district ethics committee investigator, issued an admonition pursuant to Rule 8(c)(2), RLPR. Respondent demanded a hearing pursuant to Rule 8(c)(2)(iii) and, upon conclusion of the proceedings, the panel rendered its split decision affirming the admonition. No specific findings accompanied the decision and it is unclear whether the majority of the panel was in complete agreement with the bases of the director's admonition.

Respondent challenges not only the procedural propriety but also the substantive support for the issuance of an admonition. We turn first to the claim that a split rather than a necessary unanimous decision of the panel is contrary to the spirit of Rule 9(i)(1), RLPR, and in violation of his constitutional rights. He draws an analogy between these rules and the civil rules, urging the court to impose a unanimity requirement.

We decline, however, to do so, relying upon prior decisions distinguishing professional disciplinary proceedings from traditional civil or criminal actions. *In re Rerat*, 224 Minn. 124, 127, 28 N.W.2d 168, 172 (1947). While notions of due process attend various stages of these proceedings, technicalities of pleading or procedure do not. *Id.* at 128-29, 28 N.W.2d 172-73.

See also In re Peters, 332 N.W.2d 10 (Minn. 1983) and *In re Gillard*, 271 N.W.2d 785 (Minn. 1978).

Respondent also challenges the substantive basis of the director's admonition. The director found that R.P. charged a clearly excessive fee, i.e., "after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." DR 2-106(B), Minnesota Code of Professional Responsibility (MCPR). We note that respondent has continually maintained that his travel expenses were necessarily incurred in the conscientious representation of his client and that J.G. and opposing counsel's failure to cooperate required his presence at scheduled procedural events.

While we are concerned by the fact that the unprofessional conduct which prompted the admonition is an isolated incident of a non-serious nature, particularly in light of respondent's long, unblemished legal career and the unique facts surrounding the difficult events of the marital dissolution action, we are guided by the policies underlying the decision in *Kentucky Bar Association v. Graves*, 556 S.W.2d 890 (Ky. 1977). Although the conduct there was certainly more egregious, that court was appropriately concerned with the public perception of the attorney's actions. We share that concern and, upon that basis, affirm the admonition to the extent it was based upon the respondent's inclusion of an improper travel expense in his fee charges. We acknowledge with approval R.P.'s acquiescence in and full cooperation with regard to the legal fee arbitration award.

A second basis for the admonition was the director's finding that R.P.'s correspondence with complainant was an attempt to intimidate her and interfere with the disciplinary proceeding in violation of DR 1-102(A)(5) & (6), MCPR. Our review of the record requires the conclusion that, while respondent did warn complainant about the legal significance of continued public statements relating to his legal representation, no inference of either intimidation or interference can be drawn. As indicated, the affirmance of the admonition by the panel does not specify whether all bases of the admonition were supported by the majority. Our review of the matter on the record pursuant to Rule 9(1), RLPR, requires a modification of the broad affirmance to reflect a reversal of that portion containing any reference by implication to this alleged violation.

The admonition is therefore affirmed as modified.

Amdahl, C.J. and Kelley, J., took no part in the consideration or decision of this case.

STATE OF MINNESOTA
IN SUPREME COURT
CX-85-1773

In the Matter of the Complaint of J.G.,
Complainant, against R.P., Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition for rehearing filed on behalf of Respondent R.P. be and the same is hereby denied.

By the Court:
LAURENCE R. YETKA
Associate Justice

Dated: September 15, 1986.

STATE OF MINNESOTA
Office of The Clerk of the Appellate Courts
State Capitol, St. Paul

C4-84-981
C0-84-1223

Date: July 17, 1985

In Re Charges of Unprofessional
Conduct against N.P.

Please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

IT IS FURTHER ORDERED, that respondent, Director of Lawyers Professional Responsibility is awarded attorney fees in the amount of $250.00 pursuant to Minn. R. Civ. App. 140.03.

Respectfully,
WAYNE TSCHIMPERLE
Clerk of the Appellate Courts
